DEPARTMENT OF JUSTICE

STATEMENTof
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Good morning, Mr. Chairman and members of the Committee. It is a pleasure for me to appear before you today on behalf of the Antitrust Division of the Department of Justice.

I would like to talk to you today about the current state of antitrust, including some areas of important focus for antitrust enforcers, some recent enforcement initiatives, Antitrust Division budget and staffing, and a proposal that may assist overall antitrust enforcement.

PURPOSE AND SIGNIFICANCE OF ANTITRUST

Before I do that, however, I would like to make one basic, but important, point. Sound antitrust enforcement is vital to America's economic health. American consumers and businesses benefit from a free market economy with antitrust enforcement. Protecting against anticompetitive actions helps consumers obtain more innovative, high-quality goods and services at lower prices and enhances the worldwide competitiveness of American businesses by promoting rivalry, encouraging efficiency, and ensuring a full measure of opportunity for all competitors. Indeed, contrary to the suggestions in some quarters, I believe that, as markets increasingly become global in nature, vigorous antitrust enforcement will help to ensure that American businesses will have the necessary incentives and ability to compete successfully on a global scale.

Because of these compelling reasons, antitrust enforcement has enjoyed substantial bipartisan support through the years. It is vital to our consumers, to our businesses and to our economy. And it is extremely important to antitrust enforcement that this strong, cooperative bipartisan support continue during the years ahead.

We are at an exciting and important time in the antitrust field, and antitrust enforcement is more crucial than ever in benefiting consumers and businesses and protecting them from illegal anticompetitive actions. Antitrust enforcement also is more challenging than ever. Increased globalization, a growing economy that has undergone, and continues to undergo, rapid technological change, and deregulation are all combining to lead firms increasingly to be involved in mergers as well as other strategic business arrangements, many of them somewhat novel. While most mergers and other alliances foster efficiency and thus bring increased benefits to consumers and businesses, some are pursued for -- and result in -- market power, which, in turn, decreases competition. That is why we must review these arrangements and protect the American consumer from those that threaten competition.

CURRENT STATE OF ANTITRUST

Antitrust enforcement probably has never before been as time-consuming, as complex, or as central to the functioning of our economy as it is today. Five factors especially account for these conditions:

- increasing globalization of markets
- increasing emphasis on antitrust enforcement in other countries
- increasing technological advances that can transform major industries in relatively short time frames
- increasing deregulation and the advent of competition in deregulated markets
- increasing number of mergers

Let me briefly spend a couple of minutes on each of these.

- **Globalization of Markets**

The increasing globalization of markets presents many challenges to an antitrust enforcer. First, in analyzing markets it is especially important to define properly the market in which competition is occurring. A merger or other activity that may violate the antitrust laws if the market is national in scope may be permissible if the market actually is international in scope. This is because the broader geographic scope of the market is likely to result in additional competitors being included within the market, which is one of the main indicators for whether a merger can go forward without harming competition and consumers.

A second challenge resulting from globalization is the need to ensure that our jurisdiction is sufficient to protect U.S. consumers against anticompetitive actions by foreign companies. In March of this year, we received a critically important ruling from the United States Court of Appeals for the First Circuit in United States v. Nippon Paper Industries Co. Ltd., reaffirming that Congress gave us jurisdiction to prosecute anticompetitive activities that take place off U.S. soil but have their effects here. This strengthens our ability to combat effectively the anticompetitive activity that increasingly takes place in the international marketplace to the detriment of U.S. consumers and businesses. And third, at a very basic level, the increasing globalization of markets leads to increased complexity in investigations, making it more difficult, time-consuming and costly to pursue an investigation to its ultimate conclusion. Often,

we must seek assistance from competition authorities in other countries in order to get evidence that we could not otherwise reach.

- **Global Antitrust Enforcement**

The increasing importance of antitrust in other countries and the increasing enforcement presence of foreign competition authorities likewise creates some difficult challenges, but also many opportunities, for an antitrust enforcer. The kind of challenge that I have in mind was perhaps best evidenced by, although it is by no means limited to, the Boeing/McDonnell-Douglas merger -- where U.S. and European Union authorities reached differing conclusions regarding the merger. We need to establish and cultivate good relations with foreign enforcers and understand each other's enforcement policies and practices, so that this kind of conflict is minimized, if not eliminated altogether. At the same time, increasing antitrust enforcement by other nations presents several excellent opportunities for American enforcers as well. Given jurisdictional limitations imposed by national sovereignty, effective enforcement may require action by more than one antitrust authority. Referrals of matters among antitrust enforcement agencies can also help save resources of the various antitrust enforcement agencies around the globe.

A crucial step in these matters is negotiating and implementing "positive comity" agreements with other antitrust authorities. Under such agreements, the antitrust agency of one country makes a preliminary determination that there are reasonable grounds for an antitrust investigation, typically in a case in which a corporation appears to have been denied access to the markets of another country. It then refers the matter, along with the preliminary analysis, to the competition authority whose home market is directly affected by the matter under investigation. After consultation, the referring country can accept the conclusions, seek to modify them, or pursue its own action. Such an approach has many helpful aspects. First, competition authorities have a great stake in taking such complaints seriously. Second, such a process maximizes the likelihood that the kind of evidence necessary to properly decide such cases can be obtained. Finally, this process can defuse trade tensions by providing a sensible, systematic approach to fact-gathering, reporting, and bilateral consultation among competition authorities. I would note that we currently have such agreements in place with the European Union and Canada and are working diligently to reach such agreements with other competition authorities as well.

As one example, earlier this year, we announced our first formal positive comity request to the European Union. We requested an investigation into possible anticompetitive conduct by certain European airlines that may be preventing U.S.-based computer reservation systems from competing effectively in certain European countries. This matter is being actively pursued by European competition authorities.

- **Technological Evolution**

Similarly, as sophisticated technological advances permeate more and more industries, the job of an antitrust enforcer becomes increasingly complex. It is important to understand both the technology at issue, and its likely effects, in order to reach the proper competitive

conclusions. But this is not always easy and sometimes requires significant time and expertise as well as forward vision. Technology can also bring industries previously considered separate and distinct into the same competitive marketplace, as we are increasingly likely to see in the field of communications where, for example, telephone and cable -- or, who knows, maybe wireless -- appear headed for direct competition with each other at some point.

These dynamic economic considerations have important ramifications for how we analyze mergers as well as other conduct. The existence of rapidly changing technology is, of course, always a challenge in a court case where future effects are at issue. The defendants to an action will no doubt argue that the existence of new technology will change the industry in such a fashion that there will be no anticompetitive effect of their conduct. We need to be able to critically evaluate such contentions in our investigations, and to rebut them in court when they are incorrect.

- **Deregulation and the Introduction of Competition**

Deregulation and the advent of competition in important industries also presents major challenges to antitrust enforcers. Last year, Congress passed the Telecommunications Act of 1996, which is intended to bring increased competition to the communications industry. As with any change in law, the events unfolding immediately after passage of the 1996 Act may not be exactly what was envisioned during the debate leading up to its passage. Nonetheless, members of this committee were instrumental in ensuring that the Department of Justice Antitrust Division remained centrally involved in protecting and promoting competition in this industry, and we intend to see that the responsibilities set out for the Antitrust Division in the 1996 Act are carried out as they were intended.

We have an important role in commenting to the Federal Communications Commission on section 271 applications. There have been two section 271 matters decided by the FCC thus far, and a third one is pending before the FCC. In the SBC/Oklahoma and Ameritech/Michigan applications earlier this year, we set forth in great detail our competitive analysis. I believe that our evaluations in these matters have greatly assisted the FCC and the applicants. Our analysis has established the framework to bring increased competition to consumers. Our mission now is to ensure that the Bell operating companies and their competitors will implement that framework. We will continue to carry out our important role in the section 271 process to ensure that competition is furthered as Congress intended.

Of course, the antitrust laws continue to apply fully to the communications industry, and we intend to ensure that all companies in the industry adhere to them. The 1996 Act has resulted in a substantial increase in the number of radio mergers, for example, and we have brought several actions seeking to prevent anticompetitive results in that area.

Congress is currently considering electricity restructuring, and it is important to ensure that any restructuring in that industry takes into account important competitive principles. Indeed, some of the developments we have witnessed in the process of telecommunications deregulation may be worth keeping in mind in the electricity context. As the Committee moves forward in this area, I would welcome the opportunity to work with you on this important issue.

In addition, I believe that after restructuring, we probably will see more mergers in this industry as well, and we will need to ensure that any such mergers do not violate the antitrust laws. We will work closely with this committee and with Congress to assist in any way we can.

- **Merger Wave**

Finally, the last factor I mentioned in my list is the continuing merger wave. In Fiscal Year 1996, a total of 3,094 transactions were filed with us under the Hart-Scott-Rodino Act, the most in our history. Fiscal Year 1997 has set yet another record, with 3,702 HSR filings. As opposed to the last merger wave of the 1980s, which was primarily motivated by financial considerations, today's mergers are primarily strategic in nature. This means that more than ever before the mergers raise true competitive questions that need to be reviewed carefully to ensure that the mergers will not harm competition and consumers. This merger wave presents significant challenges to an antitrust enforcer, including how we are able to keep up with the influx of mergers, how we can effectively review them in a timely fashion without imposing substantial unnecessary costs on businesses or sacrificing consumer interests, and how we resolve cases when anticompetitive concerns exist after the investigation. I believe we have taken a number of important steps in these regards -- such as speeding review of matters that do not raise serious anticompetitive concerns, focusing our investigation of any matter raising anticompetitive concerns at its earliest stages, and working closely with parties regarding our concerns, so that they can take steps to alleviate them. And we need to be ever watchful, of course, that we are doing the best we can with the resources we have.

As you can see from this lengthy list, it is an exciting and important time for antitrust and for antitrust enforcers. The challenges are many, the opportunities great, and the workload tremendous. I would like to spend a short time detailing some of our workload for the past year, and some of what can be expected in the future.

RECENT ENFORCEMENT INITIATIVES

I have been serving as head of the Antitrust Division for a little over a year, most of that time as the Acting AAG. During that time, the Division has taken many important enforcement initiatives. I would like to highlight just a few of them for you.

First, in the area of criminal enforcement, we have moved more strongly than ever against hard-core antitrust violations such as price-fixing and market allocation. We have not been content to let businesses treat antitrust violations as merely a minor cost of doing business.

Instead of limiting the fines we seek in large criminal antitrust cases to the $10 million Sherman Act statutory maximum figure, we have been aggressive in utilizing the alternative fine provision contained in 18 U.S.C. § 3571 to seek fines that are more consistent with the sentencing ranges provided by the United States Sentencing Guidelines for antitrust violations involving substantial amounts of commerce and great harm to consumers. As a result, in the past year alone, criminal fines totaling over $200 million dollars have been imposed in cases brought by the Antitrust Division. This is almost 500 percent higher than the level of criminal fines imposed during any previous year in the Division's history. Fines of this magnitude are crucial

to ensuring that companies do not treat the antitrust law as merely something that they can flout with little repercussion when and if their violations are discovered, essentially treating the antitrust laws as an incidental cost of doing business.

Our food and feed additives matters are a prime example of the importance of our criminal enforcement work. These investigations involved pursuing a massive international criminal antitrust conspiracy that resulted in a global cartel exacting inflated prices from millions of American consumers, businesses and farmers. We sought and received fines dwarfing our previous records because of the scope and importance of the violation. Companies involved in the matter have been required to take corrective action to prevent the possibility of future violations. Indeed, our experience here has shown that we need to increase the ceiling for criminal antitrust fines in general and, to that end, we are seeking to increase the maximum level of fines contained in the Sherman Act, so that the punishment can fit the crime.

Second, in the area of merger enforcement, we have been as active as ever. As I said earlier, in the recently ended fiscal year we received a record number of Hart-Scott-Rodino filings. A record $725 billion in U.S. merger transactions have taken place in 1997, as of October 20, an increase of more than 40 percent over the same period for last year, which was itself a record breaker at the time. International mergers increased significantly as well. We brought 30 merger cases in the recently ended fiscal year, which tied the record for the most in any year in our history.

But, at the same time, our enforcement record shows that we carefully review these matters and do not hinder procompetitive, efficiency-enhancing transactions from going forward. In reviewing these mergers, we are charged with distinguishing the transactions that will not harm competition (which are the majority of the transactions), from those that will injure competition and consumers. Mergers that do not threaten competition can increase efficiency, improve research and development, and lower prices to consumers. Because of these benefits, even when we do have reason to believe a merger may be anticompetitive, we work to prevent the anticompetitive aspects of that merger from going forward, while not prohibiting parts of the deal that do not raise anticompetitive concerns.

A prime example of this is our action with respect to Raytheon's acquisitions of the defense electronics division of Texas Instruments and of General Motors' Hughes Aircraft subsidiary. In the Texas Instruments matter, we reached a settlement that allowed the acquisition to go forward, but required Raytheon to sell the Texas Instruments business that produces a key component for radar systems. I believe that the merger as originally proposed would have resulted in significantly higher prices paid by the Department of Defense -- and ultimately by taxpayers -- for advanced military radars used in major weapons systems. We examined a number of narrow alternative remedies, such as requiring licensing of certain technology, but we would not accept a band-aid solution to fix a serious competitive problem. Instead we required major surgery, the largest post-war divestiture ever in the defense industry.

In the Hughes Matter, we also concluded that as proposed the merger would harm competition. We required a broad range of remedies to preserve competition prior to letting the transaction go forward. As part of the remedies we required wholesale divestiture of two

defense electronics businesses in order to preserve competition in sophisticated technology for U.S. weapons systems. We also required, as a separate remedy, that Raytheon establish procedures that prohibit a team of employees from Hughes and a team of employees from Raytheon from disclosing to each other information regarding the development and production of a new antitank missile for the Army, thus preserving the independence of these teams in this competition. Finally, as an additional remedy, Raytheon agreed to firm prices with the Air Force on certain air-to-air missiles for which there had been competing bids by Raytheon and Hughes.

It is important to note, however, that partial remedies, even those involving large divestitures (such as Raytheon/TI and Raytheon/Hughes), will not necessarily work in all cases and we must and will be prepared to go to court to challenge an anticompetitive merger in its entirety, if necessary.

Third, in the area of civil non-merger enforcement, we must ensure that important principles that have wide applicability are established and that industries important to our economy are not being harmed by anticompetitive means. In Rochester Gas & Electric, we recently brought an enforcement action against an electric utility for inducing a potential competitor to enter into a contract designed to prevent the competitor from providing low-cost electricity to consumers. We have brought actions against health care plans for anticompetitive agreements that prevent lower prices to consumers through the use of "most-favored-nation" clauses. We have also brought an action against a major medical supply corporation for intellectual property licensing practices that deter effective competition.

Last month we brought a contempt action against Microsoft charging it with violating the terms of our August 1995 settlement. In that settlement, Microsoft had agreed to refrain from certain practices that we believed restrained competition in violation of the Sherman Act. One of those practices was requiring personal computer manufacturers who desired to install Microsoft's operating system software in any of their computers to pay Microsoft a set fee for every computer they shipped, regardless of whether or not it contained the Microsoft software. Microsoft's software was in such high demand that manufacturers could not afford to do business without it. And because manufacturers almost invariably pre-install an operating system on their computers before shipping them to retailers, Microsoft's restrictive license made it decidedly more difficult for competing operating systems to even get a foot in the door and offer consumers a competitive choice. Consumers received and paid for Microsoft's operating system whether they would have chosen it first in a competitive market or not, and in order to get another operating system, they would have had to pay twice.

As part of the August 1995 settlement, Microsoft also agreed not to require any licensee to purchase another Microsoft product as a condition for licensing a Microsoft operating system, and agreed to stop requiring independent applications software developers to sign restrictive non-disclosure agreements that prevented them from developing software for Microsoft's competitors long beyond any reasonable time needed to protect proprietary information regarding Microsoft's operating system.

In our recent enforcement action, we have charged Microsoft with violating the terms of the August 1995 settlement by requiring personal computer manufacturers to license Microsoft's

Internet browser, called the Internet Explorer, as a condition of licensing Microsoft's Windows 95. Unfettered competition in Internet browser technology has the potential to create a competitive personal computer market environment in which business and consumer applications could work regardless of which operating system is installed on the computer. It is therefore important that Microsoft not be able to use its current operating systems monopoly to stifle competition in Internet browsers.

We are also asking the court to strike down portions of the non-disclosure agreements Microsoft requires its licensees and business partners to sign, which purport to prohibit them from disclosing broad categories of information deemed confidential and often require disclosure to Microsoft prior to compliance with government subpoenas. On the face of it, these agreements cover disclosures to our investigators and the courts -- at least implicitly, and sometimes explicitly. Based on information from third-parties, we are concerned that these non-disclosure agreements may unduly hamper our efforts to monitor compliance with the August 1995 settlement, as well as with our other on-going enforcement efforts relating to the computer industry. Microsoft has recently informed us that it does not interpret the agreements to cover disclosures to us, but we believe there is too much risk of a chilling effect unless those portions of the agreement are struck and Microsoft's licensees and business partners are specifically notified.

These recent enforcement actions show that we will not tolerate private agreements designed to thwart the introduction of competition in important industries. We also have important on-going enforcement priorities in banking/commerce, communications, musical licensing, and health care, to name just a few of the other important industries that we are currently looking into.

Finally, one area that cuts across all of the previously-mentioned substantive areas is international enforcement. Whether it be criminal matters, merger matters, or civil non-merger matters, we increasingly have important international aspects associated with our work. For example, approximately 30 percent of our current grand jury investigations are focused on international cartel activity; the subjects or targets of those investigations are located in more than 20 foreign countries on four continents. Many of our merger matters involve foreign firms as parties to the merger. On the civil non-merger side, we are concerned with foreign companies taking market-closing actions against American corporations in violation of our antitrust laws. The increasing globalization of markets will only increase the international nature of our work in the future.

In view of the far-reaching effects of economic globalization on the American economy, American businesses, and American consumers, the Department of Justice has recently established a new federal advisory committee, the International Competitiveness Advisory Committee. Its mission will be to provide the Antitrust Division with outside expert advice to help us in our continuing efforts to internationalize basic antitrust principles and make them the foundation for commercial relationships among nations.

More specifically, I will ask the experts who are appointed to this Committee to concentrate on three key issues. First, how can we build an international consensus that

horizontal cartel agreements are condemnable and must be challenged by competition enforcement authorities around the world? Second, at a time when increasing numbers of mergers involve international transactions that directly affect competition in more than one country, how can the various competition enforcement authorities best coordinate their merger review efforts to achieve results that are fair both for the parties to these mergers and the countries affected by them? And third, how best can the fundamental principles of competition policy be made an integral part of U.S. trade policy, so that the pursuit of the latter reflects, rather than rejects, the goals of the former? I strongly believe that getting the right answers to these questions is essential to the maintenance of free and fair international commerce, which greatly benefits the U.S. economy.

While this advisory committee is still in its formative stage, its ultimate recommendations will be of great assistance to the Department of Justice as we continue our efforts to expand the understanding and importance of competition policy as it relates to the burgeoning commercial relationships between the United States and its international trading partners.

Our workload is expanding, its complexity is increasing, its importance to American businesses and consumers has never been greater. To effectively continue to carry out our mission we need increased resources.

ANTITRUST DIVISION BUDGET AND STAFFING

For the last Fiscal Year and in the Continuing Resolution, the Antitrust Division's budget is $92,447,000, providing for a total of appropriated staffing level of 831 positions. We sincerely appreciate the support of this Committee in providing the Division these resource levels.

We currently are fully staffed, working hard to protect American consumers through enforcement of the antitrust laws of the United States. This level of staffing is vitally necessary to our mission. I would note, however, that this level is still significantly lower than the staffing levels of the Antitrust Division in 1980 (when we had 982 employees), a time when the economy was significantly less complex and smaller -- there were far fewer mergers then and the international dimensions of enforcement were almost non-existent.

In light of our tremendous ongoing workload and its projected expansion, the President's FY 1998 budget for the Antitrust Division is $97,542,000, which includes increases to handle cost-of-living expenses and $3,814,000 to hire additional attorneys, paralegals, and other critical support. Congressional action to date on our FY 1998 budget request includes a House-passed level of $94,540,000, a cut from the President's request by $3 million. The Senate passed an authorization of exactly the same as Fiscal Year 1997, or over $5 million less than the President's request. The current Senate level will effectively require the Antitrust Division to take a funding cut to absorb $1,200,000 in cost-of-living expenses. To say the least, I am extremely concerned about our FY 1998 funding level, especially in light of the enormous tasks facing the Antitrust Division in the near future.

We are in the midst of a continuing wave of strategic mergers, and are contending with increasing globalization and internationalization in markets. We are being forced to deal with increased complexity in antitrust analysis given lightening-paced leaps in technology, and are grappling with the increased role of the Antitrust Division in preserving and protecting competition in important industries being subject to competition to an extent never before. It is clear that increased resources are necessary to successfully meet these challenges. I want to assure you that we are frugal with our spending and we are working hard to implement the Government Performance and Results Act, which should have positive effects in emphasizing efficiency.

Our mission is absolutely critical and I do not think that any fair assessment of what we are doing and its importance to the economy can lead to any other conclusion. I believe that increased resources are necessary.

ANTITRUST PROPOSAL

I mentioned earlier in my testimony the importance of hefty criminal fines to ensure that antitrust compliance is not considered a mere minor cost of doing business. The statutory maximum fine established for antitrust violations is currently $10 million. The methodology adopted by the U.S. Sentencing Commission appropriately calculates fines for antitrust offenses based on a percentage of the volume of commerce affected by the conspiracy. In an increasing number of our prosecutions against corporations that involve very large volumes of commerce, however, the objective of the Sentencing Commission methodology -- which in those cases would result in fines greater than $10 million -- is thwarted by the $10 million statutory maximum. In such cases, the only alternative to a fine statutorily capped at $10 million is for the offending corporation to be sentenced under the "twice-the-gain or twice-the-loss" alternative sentencing provision, 18 U.S.C. § 3571(d). The Division has on four occasions been able to use that provision to obtain fines greater than $10 million in negotiated plea agreements. Unfortunately, in antitrust offenses, proving actual gain to the conspirators or loss to the victims from an antitrust offense is extremely difficult.

The end result is that for the largest, most harmful antitrust conspiracies -- typically conspiracies involving international cartels and foreign corporations -- the standard methodology adopted by the Sentencing Commission for calculating antitrust fines is mooted in favor of a fine calculation that tends to be more and more lenient towards bigger and bigger offenders. The current statutory scheme provides less deterrent effect for firms harming the largest volume of commerce and causing the greatest injury to U.S. firms and consumers -- a perverse result. Raising the maximum antitrust fine in the Sherman Act would help rectify this problem and ensure that multinational corporations that commit antitrust offenses involving hundreds of millions or billions of dollars in U.S. commerce are punished just as severely, in relative terms, as local firms that commit antitrust offenses involving far lesser sums. Our recent experience suggests that $100 million would be a more appropriate statutory maximum. I would welcome the opportunity to work with the Committee on such legislation.

CONCLUSION

The Antitrust Division has worked hard to carry out its responsibilities to the American consumer and has much more hard work in front of it. We will work to protect the marketplace so that it is free of anticompetitive conduct and all companies can compete on a level playing field.

Carrying out our responsibilities requires hard work and intelligence, among many other traits. I believe that we have an excellent staff that is prepared and trained to do the best job possible to protect the American consumer. We all look forward to the challenges that we face, as well as the opportunities that we have, to ensure that consumers are benefited by competition that produces low prices, high quality and innovative goods and services.